IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

State of Ohio ex rel. Michael DeWine Attorney General of Ohio,	)	CASE NO. 2012 CV 11
	)	JUDGE YOST
Plaintiff,	)	**JUDGMENT ENTRY**
vs.	)	
Big Sky Energy, Inc.,	)	
Defendant.	)	

PROCEEDING: Civil Penalty Hearing

DATE: October 31, 2013

APPEARANCES: Casey L. Chapman and Christine L. Rideout for the Plaintiff. Gino Pulito for the Defendant.

A complaint for injunctive relief and civil penalty was filed against the Defendant on January 5, 2012. On February 9, 2012, the Court scheduled the injunction hearing for April 18, 2012. Following an evidentiary hearing, the Court granted the requested injunction and retained jurisdiction to determine a civil penalty, per judgment entry filed May 2, 2012. Counsel for the Defendant continues to refer to the injunction hearing as an *ex parte* hearing. However, the Court record reflects that notice of the hearing was sent to the Defendant. After allowing a period for discovery, the Court conducted the penalty hearing on October 31, 2013. The Court received the

evidence and the testimony of the witnesses offered by the parties.

LIABILITY

Based upon the evidence presented at the injunction hearing on April 18, 2012, the Court found that the Defendant did discharge sediment or fill material into a tributary of Hubbard Creek and did degrade or destroy a wetland without complying with applicable statutes and administrative regulations. Following the penalty hearing, the Defendant has argued that the State has failed to establish that the subject property contained wetlands. The Defendant has not addressed the discharge into the Hubbard Creek tributary, but does generally argue that there is no evidence of harm, either actual or threatened. In arguing that the State has failed to prove the existence of wetlands, the Defendant contends that soil samples are required to establish a wetland. The witness, Edward Wilk, testified at both the injunction hearing and at the penalty hearing regarding the criteria used to determine that wetlands were present on the subject property. The statutory and administrative procedures dealing with the preservation of wetlands require that the party undertaking development activity on the property determine the specific delineation of the wetlands, by engaging an environmental consultant, as the Defendant was ordered to do in the judgment entry dated May 2, 2012. Perhaps it is possible that a qualified environmental consultant could conclude that there are no wetlands on the

property in this case. However, on the basis of the evidence, the Court finds that the Plaintiff has established the presence of wetlands. It is not necessary that there be evidence of soil samples in order to meet the burden of proof on this issue.

HARM OR THREAT OF HARM

The Defendant contends that the Plaintiff has failed to produce any evidence of actual harm, or threat of harm, to the environment. One weakness in the Defendant's position is the weight sought to be given to photographs taken long after the activity upon which the complaint is based. The evidence showing the condition of the property at the time the Defendant was actually conducting drilling operations suggests a significant environmental impact. The Plaintiff's interest is focused on the impact to wetlands, which might more accurately be determined by a qualified environmental consultant. However, the evidence is that in conducting Defendant's drilling operations, parts of an existing stream were destroyed, with the result that considerable sediment was picked up by the flowing waters. Based upon the evidence in the record, the Court finds ample evidence of harm and threat of harm to the environment.

LEVEL OF RECALCITRANCE

Regardless of what obligation the Defendant may have had to anticipate the wetlands issue and initiate contact with the Environmental

Protection Agency, the evidence is quite clear that the Defendant was given written notice of the wetlands violation; that the Defendant failed to respond to or address the violation notice; and that the Defendant subsequently refused to allow the EPA access to the site. Even if the Defendant disagreed with the actions of the EPA, there has been a complete failure to appropriately respond to the notice of violation. The Defendant instead has chosen to act in defiance of, or with indifference to, the environmental concerns posed in this case.

ECONOMIC BENEFIT

Clearly there has been economic benefit to the Defendant in avoiding any of the costs associated with addressing the issues raised in the original violation notice issued by the EPA, and otherwise taking measures to comply with the reasonable requests of that agency. The Defendant has not attempted to argue that avoidance of the ordinary expenses associated with wetlands preservation measures is not an economic benefit. Rather, the Defendant claims that it did not benefit financially, because it was not the owner of the property involved in this case. First of all, as the Plaintiff has pointed out, the Defendant admitted in its answer that it is the proper party to be named in the complaint. Secondly, up to the time of the hearing, it has never been disputed that the Defendant was conducting the drilling operations on the premises. The Defendant now claims that it was merely

the bondholder for Ohio Department of Natural Resources' permitting purposes. A tank placed on the drilling site was marked as property of Big Sky Energy, Inc. The letter from Big Sky Energy, Inc., apparently directed to the Ohio EPA, while generally threatening in tone, essentially acknowledges its responsibility for the operations on the property in question, but claims that everything was in compliance with ODNR rules. The damage to the wetlands in this case was caused by the well drilling operations. The evidence is that the Defendant conducted the well drilling operations. Counsel's assertion that the Defendant was merely the bondholder for permitting purposes is not supported by the evidence.

EXTRAORDINARY ENFORCEMENT COSTS

The Plaintiff argues that extraordinary costs in this case have resulted from Court involvement in litigation, directly caused by the Defendant's failure to cooperate in the resolution of issues at the administrative level. The Defendant argues that the Plaintiff cannot claim enforcement costs because it has not proved the Defendant's responsibility for alleged violations, it has not proved that the Defendant's activities were subject to the EPA's enforcement powers, and it has not proved that a wetland existed on the property. The Court has determined that the evidence supports the existence of wetlands on the subject property; that the Defendant has failed to cooperate in any way with the EPA's investigation of the wetlands

concerns; and that Big Sky Energy, Inc. conducted the well drilling operations that resulted in damage to the wetlands. The Defendant's failure and refusal to comply with the statutory and administrative procedures to accurately delineate the wetlands and take appropriate measures to minimize the impact and adequately restore the affected wetlands has necessitated extraordinary enforcement costs to the Plaintiff, including the need to obtain a search warrant just to inspect the premises, and the need to obtain an injunction just to secure the Defendant's compliance with its statutory and administrative responsibilities. The injunction was issued May 2, 2012. The evidence is that, as of the date of the civil penalty hearing, the Defendant has done nothing to comply with the order of injunction.

The Court finds that the Plaintiff has presented substantial evidence on all of the factors suggested in *State ex rel. Brown v. Dayton Malleable* (April 21, 1981), Montgomery App. No. 6772, unreported.

CIVIL PENALTY

Based upon the facts and circumstances in evidence in this case, a civil penalty is warranted, for the Defendant's violation of and failure to perform the duties imposed by sections 6111.01 to 6111.08 of the Revised Code. Ohio Revised Code §6111.09, provides for an amount up to $10,000.00 per day. At the time of this hearing, the Plaintiff contends that the violation has continued for 4,928 days. Although the Defendant has denied liability, this

length of time has not been disputed. The Plaintiff has requested a civil penalty of one percent of the statutory maximum. While $492,800.00 seems like a substantial sum, the point of the civil penalty is to serve as a deterrent. In arguing why the Plaintiff has failed to prove liability in this case, the Defendant has not offered any evidence or argument on the issue of mitigation of the civil penalty. Based upon the evidence that has been presented, the Court finds that one percent of the possible maximum civil penalty is reasonable.

ORDER: 1. The Defendant, Big Sky Energy, Inc., shall pay a civil penalty of $492,800.00.

2. One-half of this sum shall be credited to the environmental education fund and one-half to the water pollution control administration fund, as provided in ORC §6111.09(B).

THIS IS A FINAL APPEALABLE ORDER. Within three (3) days of the entry of this judgment upon the journal, the Clerk of Courts shall serve notice in accordance with Civ. R. 5, of such entry and the date upon every party who is not in default for failure to appear and shall note the service in the appearance docket.

The Clerk is directed to serve notice of this judgment and its date of entry upon the journal upon the following: Casey L. Chapman, Esq.; and Gino Pulito, Esq.

GARY L. YOST, JUDGE

6

GLY/jab